Supreme Court, U. S.
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79-1304

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No.

CITY OF NEW YORK,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Opinion Below

The Court of Appeals for the Second Circuit Affirmed on the opinion below, and did not render its own opinion. The Court's affirmance is attached hereto as Appendix I and the District Court's opinion is attached hereto as Appendix II.

Jurisdiction

The decree sought to be reviewed is dated and entered November 26, 1979.

The Court has jurisdiction to review the decree in question by writ of certiorari pursuant to 28 U.S.C. §1254(1).

Question Presented

Whether the City of New York is a "person" for the purposes of 33 USC §1321 of the Federal Water Pollution Control Act of 1972 and, thus, whether the United States Coast Guard has jurisdiction over the City to assess it penalties for violations of that statute.

Relevant Constitutional and Statutory Provisions

Federal Water Pollution Control Act, 33 USC §1321

(a)(4) "owner of operator" means in the case of a vessel, any person owning

operating, or chartering by demise, such vessel, and (b) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility....

(a)(7) "person" includes an individual, firm, corporation, association, and a partnership.

(b)(3) The discharge of oil or hazardous substances into or upon the navigable waters of the United States....is prohibited....

(b)(6) Any owner or operator of any vessel, onshore facility or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard

is operating of not more than $5,000 for each offense...

Preliminary Statement

This Court is presented with the opportunity to consider a question of first impression and a question involving a principle of wide application; namely, the reach of 33 USC §1321, a part of the Federal Water Pollution Control Act of 1972. The Court of Appeals, in affirming the District Court's decision, is of the view that strict liability is to be imposed for oil spills into the navigable waters not only upon business concerns but also upon municipal corporations. The Court of Appeals in affirming the District Court decision interpreted the definition of the term "person" contained in §1321(a)(7) to also include municipal corporations. Petitioner con-

tends, however, that Congress intended to exclude municipalities from the penalty provisions for oil discharges. This interpretation is based upon the legislative purpose of §1321, the text of §1321 and the overall language of the Federal Water Pollution Control Act.

Statement Of The Case

Commencing on July 11, 1975 and thereafter on four different occasions, the Coast Guard determined that City owned facilities were the source of five oil spills into the navigable waters. The City was notified by the Coast Guard that these oil spills violated §1321(b)(3) of the FWPCA.

The City requested hearings on the charges and claimed, inter alia, that it was not subject to the jurisdiction of the Coast Guard for the alleged violations and

thus not liable for penalties. The Coast Guard rejected this claim and imposed penalties upon the City pursuant to §1321 (b)(6) of the FWPCA. These decisions were all affirmed on appeal by the appropriate administrative bodies.

Based on its position, the City refused to pay the penalties. Accordingly, on July 12, 1978, the United States instituted an action seeking payment of the penalties. The City filed a motion to dismiss the complaint on August 3, 1978, and, the District Court, in a decision dated March 7, 1979, denied the motion. The District Court concluded that the City was included within the term "person" in §1321. (A copy of the District Court's decision is annexed hereto as Appendix II). Since there was no factual dispute, the City agreed to the filing of an Order and Judgment on consent declaring

the City liable for the penalties. This Order and Judgment was filed on May 24, 1979.

The City appealed the final Order and Judgment to the Court of Appeals for the Second Circuit on July 12, 1979. The Court of Appeals affirmed the District Court's decision on November 26, 1979.

ARGUMENT

THE COAST GUARD DOES NOT HAVE JURISDICTION TO IMPOSE PENALTIES ON THE CITY FOR VIOLATIONS OF §1321.

The Court of Appeals in affirming the District Court's decision has concluded that notwithstanding the entities enumerated within the term "person", as defined in §1321(a)(7), are limited to business entities, a municipal corporation is included within the term "person" and is subject to the penalty. This in-

clusion of a political entity within the enumerated group as a "person" is predicated on the fact that either a municipal corporation is included within the enumerated term "corporation" or that the word "includes" utilized in the definition is meant to be applicable to municipal corporations. While petitioner does not quarrel with the proposition that the term "person" has been construed to include municipal corporations, see, e.g., Monell v. Department of Social Sevices of the City of New York, 436 U.S. 658 (1978), or that the term "corporation" has been construed to mean a municipal corporation, or that the term "include" has been construed to indicate additions to those enumerated, petitioner respectfully submits that the overall language in §1321 and of the FWPCA, and the legis-

lative history of §1321, indicate that the term "person" in §1321 was not intended to include political entities.

The entities enumerated within the definition of the term "person" in §1321 includes "an individual, firm, corporation, association and a partnership." Clearly, the sense of this enumeration is that the statute is directed towards individuals and business concerns, not governmental entities. Certainly, if governmental entities were meant to be included, Congress could have easily thus expressed itself, without leaving the question subject to implication or speculation. Indeed, in §1362(5) of the FWPCA, Congress explicitly did so. "Person" therein "means an individual, corporation, partnership, association, State, Municipality, Commission, or political subdivision of a State, or any interstate body." There

is no logical reason for Congress to leave the term "person" in §1321 subject to inferences and speculation when Congress could just as well have defined "person" therein consistent with §1362(5).

Significantly, in analogous situations, such as in the securities field, the courts have held that the different meaning given a term within the context of a comprehensive statutory framework signifies a Congressional intention to exclude. See, In Re New York City Municipal Securities Litigation, MDL Docket No. 314, (S.D.N.Y. 1980); Greenspan v. Crosbie, [1976-1977 transfer binder] Fed. Sec. L. Rep. (CCH), ¶95, 780 (S.D.N.Y. 1976); In Re Equity Funding Corp. of America Securities Litigation, 416 F. Supp. 161 (C.D. Cal. 1976). These Courts, in deciding that §10(b) of the 1934 Securities Act did not

apply to governmental entities, reasoned:

> "This definition of "person" [§3(a)(9) of the 1934 Act] does not, by its terms, apply to municipalities, states or the federal government. Nor can such entities be included by implication. This is clear from a comparison of §3(a)(9) of the 1934 Act with §2(2) of the 1933 Act. 15 U.S.C §77b(2) in which Congress expressly included governmental entities...." In Re New York City, supra, at p. 18.

> "It is significant that the earlier Securities Act of 1933 defines 'person' as 'an individual, a corporation, a partnership, an association, a joint stock company, a trust, any unincorporated organization, or a government or political subdivision thereof.' 15 U.S.C. §77b(2). The definition in the 1934 Act virtually parallels this language, with the important exception that governments are excluded. This omission was surely not accidental. Congress obviously intended to exclude governments from liability for violations of the 1934 Act." Greenspan, supra at 90,827

> "'Person,' for purposes of determining who may be liable under §10(b), is defined in §3(a)(9) of the 1934 Act as:

> 'an individual, a corporation, a partnership, an association a joint-stock company, a business trust, or an unincorporated organization.'
> This is in contrast to §2(2) of the 1933 Act that includes 'a government or political subdivision thereof' within its defintion of 'person.' The definition of 'person' provided by §3(a)(9) simply does not encompass states or their agencies." Equity Funding. supra, 416 F. Supp. at 198.

see, also, Monell v. Dept. of Social Services of the City of New York, 532 F. 2d 259, 263, n. 3, (2d Cir. 1976), rev'd on other grounds, 436 U.S. supra.

The Court of Appeals' apparent reliance on the term "include" as indicating a more expansive definition than the enumerated entities is not determinative. Petitioner agrees with the proposition that the term "includes" signifies more. But, where is it implicit in that term that

the inclusion extends to entities not related to those enumerated? There are additional types of business concerns such as a joint-stock company, a business trust or an unincorporated organization and Congress instead of enumerating all these types of business concerns utilized the work "include."

Additionally, the legislative history of §1321 supports the view that the section is directed at the shipping and oil industries and the abuses connected with their operations which were of concern to Congress, not at the operation of municipal ferries or incinerators or other facilities. Thus, Respresentative Wright, in emphasizing the purpose of the oil pollution statute in the Water Quality Improvement Act of 1970, the predescessor to §1321, stated:

> "However, several recent instances such as the breaking of the tanker Torrey Canyon off the coast of England and misfortune of the SS Ocean Eagle off the Puerto Rican coast and most recently the despoliation of California beaches by oil from an offshore drilling rig, have indicated to us that we need the capacity to do much more than the oil pollution act of 1924 permits."

115 Cong. Rec. 9025 1969.

Significantly, throughout the FWPCA Congress is proceeding on the theory that water pollution control of this type constitutes a cooperative federal, state and local endeavor. See, e.g., §§1311, 1321 subdivisions (c)(2)(g), (e) and (0)(2). And, in fact, the typical method chosen by Congress in solving problems of this magnitude is through the cooperative efforts of federal state and local governments, to wit, by negotiation, funding for research,

the establishment of timetables and, if necessary, seeking injunctive relief. There is simply no basis to support the proposition that with regard to oil pollution this cooperative endeavor should be displaced by the imposition of strict liability for oil discharges. This argument is all the more compelling in light of the recent decision by the Court of Appeals for the 10th circuit in Ward v. Coleman, 598 F. 2d 1187 (10th Cir. 1979), concluding that the penalties contained in §1321(b)(6) are criminal in nature. Certainly, had Congress wished to impose strict criminal penalties on municipal corporations, it would have done so in clear language.

Finally, the Court of Appeals' affirmance fails to come to grips with the resulting anomaly of its decision,

namely, the apparent different treatment afforded different political entities by Congress in §1321. Specifically, it cannot seriously be argued that States are included within the term "person" contained in §1321 or the entities enumerated therein. Certainly, had Congress intended to include States in these provisions Congress would have defined "person" in a more precise manner rather than leaving the issue to speculation and implication. Additionally, the United States Coast Guard, the agency charged with administering the provisions of §1321, has issued regulations for the enforcement of §1321 in which the Coast Guard concludes that States and unincorporated political subdivisions are excluded from the penalty provisions of §1321 since these entities are not "persons" or "corporations". Certainly, the

Coast Guard interpretation is entitled to at least considerable deference. Udall v. Tallman, 380 U.S. 1, 15, 16 (1964). This is particularly so when the administrative practice act at stake,"

> "...involves a contemporaneous construction of a statute by the men charged with the responsibility, setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new."

380 U.S., supra; see, also Power Reactor Development Co. v. International Union of Electricians, 367 U.S. 408 (1960).

Because of this exclusion of certain governmental entities, the argument that the exclusion of municipal corporations from §1321 would render the definitions of "vessel" and "public vessel" superflous is incorrect. The excluded governmental entities, such as the United States, states and unincorporated political subdivisions

are enumerated within the definition of "public vessel". Thus, to paraphrase the District Court, "what sense does it make to exempt the vessels owned by the United States, the States and unincorporated political subdivisions that are not used in commerce if these entities, themselves, are not persons within the meaning of §1321 (a)(7)". Additionally, Section 1321 does not merely impose penalties for oil spills and the like, but also provides for numerous other things, including granting the Coast Guard authority to board vessels -- except public vessels. (See, §1321(m). While under §1321 a publicly owned vessel engaged in commerce may be boarded, it does not at all follow that Congress intended to to further and impose liability on the governmental owners of such vessels or

other facilities where the Act otherwise indicates just the opposite.

More fundamentally, however, the exclusion of States and other political entities evidences that Congress created exemptions from the penalty provisions of §1321 and that these exemptions do not defeat any Congressional purpose in that section. Thus, the sole reason for including municipal corporations within §1321 and affording it different treatment from the other excluded political entities, is simply because municipal corporations are sometimes referred to as "corporations", while the other political entities are not. Clearly, such a distinction has nothing to commend it in terms of common sense, the general scheme and overall language of the statute, or the statute's legislative history.

In conclusion, this case presents the Court with the opportunity to rule on a question of first impression: the reach of §1321. The issue is now active in other circuits* and the Court has the opportunity to rule on the question and to clarify the rule for the circuits. Also presented is the opportunity to determine an important question of federalism, namely, whether Congress intended to infringe upon the powers of the States by imposing upon governmental entities strict liability or, as the Court of Appeals in Ward v. Coleman, supra, concluded, criminal penalties, rather than utilizing the traditional method adopted by

*The First Circuit on February 4, 1980, in United States of America v. Massachusettes Bay Transportation Authority, Index No. 79-1512 (1st Cir. 1980), reversed a lower court decision and concluded that the defendant there, a public authority, was a "person" for purposes of §1321.

Congress in resolving disputes with States and localities.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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A P P E N D I C E S

APPENDIX A

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on the opinion below of the Hon. Lee P. Gagliardi, 78 Civ. 2681 (Mar. 7, 1979).

WILLIAM H. MULLIGAN
William H. Mulligan

THOMAS J. MESKILL
Thomas J. Meskill

AMALYA L. KEARSE
Amalya L. Kearse

DECISION OF DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-against-

CITY OF NEW YORK,

Defendant.

78 Civ. 2681

MEMORANDUM DECISION

GAGLIARDI, D.J.

This is an action to recover civil penalties assessed by the United States Coast Guard against the City of New York (the "City") for discharges of oil into the navigable waters of the United States in violation of the Federal Water Pollution Control Act of 1972 ("FWPCA"), 33 U.S.C. §1321(b)(3). Jurisdiction is pre-

mised upon 33 U.S.C. §1321(n). The City has moved to dismiss the complaint for failure to state a claim. Rule 12(b)(6), Fed. R. Civ. P. The motion is denied.

The allegations of the complaint, deemed true for the purposes of this motion, are as follows: On five separate occasions between July 11, 1975 and July 9, 1976, a discharge of oil into the navigable waters of the United States occurred from a City owned or operated vessel or facility. On each occasion, the District Commandar of the Third Coast Guard District assessed a civil penalty against against the City pursuant to 33 U.S.C. §1321(b)(6), which assessment was affirmed, on appeal, by the Commandant of the United States Coast Guard. The aggregate amount of the penalties assessed in $1200.00. The City has not paid the amount due.

The City has moved to dismiss the complaint on two separate grounds: 1. that the City is not an "owner, operator or person" as defined by 33 U.S.C. §1321(a) and thus cannot be assessed a civil penalty pursuant to §1321 (b)(6) and 2. that three of the penalties assessed are invalid because the Coast Guard failed to show fault on the part of the City and the statute does not impose strict liability for oil discharges.

Liability of Municipal Corporations for Civil Penalties Pursuant to §1321(b)(6)

The FWPCA, a modification of the 1970 Water Quality Improvement Act ("WQIA"), is a "comprehensive plan attempting to expedite oil pollution cleanup and to establish a workable scheme for limiting and distributing liability." Tug Ocean Prince, Inc.

v. United States, 584 F. 2d 1151, 1162 (2d Cir. 1978). The board policy of the Act is that "there should be no discharge of oil or hazardous substances into or upon the navigable waters of the United States . . . ." 33 U.S.C. §1321(b)(1), and "[t]he discharge of oil or hazardous substances. . . into or upon the navigable waters of the United States. . . in harmful quantities as determined by the President. . . is prohibited." Id. §1321 (b)(3). Owners or operators of vessels and onshore or offshore facilities are liable for clean-up costs, subject to the defenses of act of God, act of war, negligence of the United States government, or the act or omission of a third party. Id. §1321(f). If the discharged substance is nonremovable, the owner or operator is

liable for a civil penalty of varying amount dependent upon the amount and toxicity of the substance spilled and subject to the four defenses enumerated above. Id. §1321 (b)(2)(B). Finally, 33 U.S.C. §1321(b)(6), the provision at issue in this case, makes "any owner, operator, or person" in charge of any onshore facility, offshore facility or vessel from which oil is discharged liable for a civil penalty of up to $5,000, in an amount to be determined by the Coast Guard.

Resolution of the City's first ground for dismissal turns upon an interpretation of the definitional sections of the act. For the purpose of 33 U.S.C. §1321, the term "owner or operator"

> means (A) in the case of a vessel, any person owning, operating, or chartering,

> by demise, such vessel, and (B) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility and (C) in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to abandonment.

33 U.S.C. §1321(a)(6). Moreover, 33 U.S.C. §1321(a)(7) states that:

> "person" includes an individual, firm, corporation, association, and a partnership.

The City contends that §1321(a)(7)'s failure to enumerate municipalities among the alternative definitions of "person" indicates that Congress intended to exclude municipalities from the scope of the FWPCA.

The starting point for questions of statutory interpretation must be the words of the statute itself. See, e.g., Ernst &

Ernst v. Hochfelder, 425 U.S. 185, 198-99 (1976). Although §1321(a)(7) does not specifically include municipalities within its definition of "persons" potentially liable under the Act, it does not specifically exclude such entities either. Indeed,

> [t]he word "includes" is usually a term of enlargement, and not of limitation. . . It therefore conveys the conclusion that there are other items includable, though not specifically enumerated by the statute.

Argosy Limited v. Hennigan, 404 F. 2d 14, 20 (5th Cir. 1968), citing Federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U.S. 95 (1941); United States v. Gertz, 249 F. 2d 662, 666 (9th Cir. 1957).

If municipalities were not included within the statutory definition of "persons", other portions of §1321 would be

rendered superfluous. Operators and owners of vessels which discharge oil and other hazardous substances are subject to the various liabilities and penalties set forth in that section. The statute defines "vessel" to mean

> every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water other than a public vessel.

33 U.S.C. §1321(a)(3) (emphasis added). The term

> "public vessel" means a vessel owned or bareboat chartered and operated by the United States, or by a State or political subdivision thereof, or by a foreign nation, except when such vessel is engaged in commerce.

Id. §1321(a)(4) (emphasis added). Congress, therefore, clearly intended to subject municipally-owned vessels that are engaged in

commerce to the penalties set forth in the remainder of §1321. It would make no sense to exempt municipally-owned vessels that are not used in commerce if the municipalities, themselves, were not "persons" within the meaning of §1321(a)(7). "Every word used in a statute is presumed to have a meaning, and, if possible, every word must be accorded significance and effect." Argosy Limited v. Hennigan, supra, 404 F. 2d at 20, citing General Motors Acceptance Corp. v. Whisnant, 387 F.2d 774 (5th Cir. 1968).

Including municipalities within the statutory definition would also accord with legislative intent. The expressed Congressional policy that there be no discharges of oil is absolute on its face. See 33 U.S.C. §1321(b)(1), quoted supra.

"There are no qualifications or exemptions suggested in the foregoing statement of policy. Similarly, in defining the terms used in the Act, Congress chose language of sweeping inclusiveness." United States v. Buntin, 11 E.R.C. 1061 (M.D. Tenn. 1976). The legislative history of the definitional sections of the Act also supports this construction. The House of Representatives' version of the WQIA specifically excluded federal or state-owned facilities from liability for oil discharges. H. Rep. No. 91-127, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Congr. & Adm. News 2702-03. These exclusions were subsequently deleted by the Joint Conference Committee. Conf. Report No. 91-940, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Congr. & Adm.

News 2724-25. Although no specific reason was given for this deletion, it cannot be assumed that it was without significance.

The parties have not cited any case which has decided this precise issue, and the court's own research has not found one, but that may be attributable to the fact that the courts have simply assumed the FWPCA to be applicable to municipalities. See, e.g., City of Pawtucket v. United States, 10 E.R.C. 2070 (Ct. Cl. 1976). In light of the plain meaning and structure of the Act, its legislative history and the avowed Congressional purpose for its enactment, the court finds that assumption well warranted.

B. The Liability for Civil Penalties Without Fault

The City's second ground for dismissal,

that liability may not be imposed for civil penalties pursuant to 33 U.S.C. §1321(b)(6) without a finding of fault and that the Coast Guard found no negligence on the City's part on three of the occasions alleged in the complaint, is not cognizable on a motion to dismiss pursuant to Rule 12 (b)(6). The legal sufficiency of the complaint is the sole matter in issue on such a motion and the complaint does not set forth the Coast Guard's conclusions of law. Although the City has not moved for summary judgment, it has submitted a copy of a decision by the Acting Chief Counsel of the United States Coast Guard in which a "strict liability" standard is applied. Treating the City's second ground for dismissal as a motion for partial summary judgment, the motion is denied.

"The civil penalty provision [of 33 U.S.C. §1321(b)(6)] is clearly one of strict liability. . . and every court which has considered the question has so held." United States v. Marathon Pipe Line Co., 12 E.R.C. 1588, 1590 (7th Cir. Dec. 22, 1978), citing Tug Ocean Prince, Inc. v. United States, 436 F. Supp. 907, 924 (S.D.N.Y. 1977), aff'd in part & rev'd in part, 584 F.2d 1151 (1978); United States v. Atlantic Richfield Co., 429 F. Supp. 830, 836-37 (E.D. Pa. 1977); Ward v. Coleman, 423 F. Supp. 1352, 1357 (W.D. Okla. 1976): United States v. General Motors Corp., 403 F. Supp. 1151, 1157 (D. Conn. 1975); United States v. Eureka Pipeline Co., 401 F. Supp. 934, 942 (N.D. W. Va. 1975).

Conclusion

The City's motion is denied in all respects.

So Ordered.

_____

U.S.D.J.

Dated: New York, New York
March 7, 1979.